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No. 87-583

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

UNITED PAPERWORKERS INTERNATIONAL UNION, AFL-CIO, LOCAL NO. 1069,
Petitioner,

v.

S. D. WARREN COMPANY, A DIVISION OF SCOTT PAPER COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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REPLY BRIEF FOR PETITIONER

MARK BROOKS
UNITED PAPERWORKERS INTERNATIONAL UNION
P.O. Box 1475
Nashville, TN 37202

LAURENCE GOLD
(Counsel of Record)
DAVID SILBERMAN
815 Sixteenth Street, N.W.
Washington, D.C. 20006
(202) 637-5390

Of Counsel:
STEPHEN P. SUNENBLICK
P.O. Box 7060, DTS
97 India Street
Portland, ME 04112

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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Petitioner United Paperworkers International Union, Local 1069 agrees with respondent S.D. Warren Co. that it may be appropriate for the Court to "postpon[e] a decision to grant certiorari" in this case "until [the Court] renders a decision in [No. 86-651, *United Paperworkers v.*] *Misco*." Resp. Br. at 11. But as we proceed to show, respondent is wrong in contending that "if this Court reverses the Fifth Circuit's *Misco* decision, there [would be] no reason to review this case." *Id.* at 12.

A. Respondent seeks to avoid review on the ground that "the question" in this case, as "in any given case" involving review of a labor arbitration award, "is whether a court was correct in concluding, based on the facts before it, that the award did or did not draw its

essence from the contract." Resp. Br. at 10. That commonplace is an inadequate response to our petition.

As Professor Kaden has explained (in an article to which this Court previously has looked for guidance[1]), the "cryptic caveat in [*Steelworkers v.*] *Enterprise Wheel*, [363 U.S. 593, 597 (1960)], that finality [of arbitral awards] turns upon whether the arbitrator has drawn the 'essence' of his award from the agreement" provides "little guidance as to the appropriate standard for judicial review of arbitral awards." Kaden, *Judges and Arbitrators: Observations on the Scope of Judicial Review*, 80 Colum. L. Rev. 267, 270 (1980). As a result, the "mission launched" by *The Steelworkers Trilogy* has "foundered in the circuits," *id.*; "[i]n the absence of adequate guidance, the lower courts have had difficulty in formulating and applying standards to determine whether an arbitrator has respected the limits of the authority granted him by the collective bargaining agreement." *Id.* at 267-68. The courts of appeals' "wavering and uncertain pattern" of decisions has created a "demonstrated need" for the Court to "return to the subject" in order "to clarify the reasoned justification for the finality principle, and thus to identify a meaningful standard for judicial review of arbitration awards." *Id.* at 267, 277.

B. In our petition, we reviewed one manifestation of the need for further guidance by this Court in this area: faced with the precise issue posed here, the courts of appeals have split 4 to 3 over whether to enforce arbitral awards of the type rendered by the arbitrator in this case.[2] Respondent claims that "[t]his simply is

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[1] *See W. R. Grace & Co. v. Rubber Workers*, 461 U.S. 757, 766 (1983).

[2] *See also* Kaden, *supra*, at 271 ("One manifestation of judicial ambivalence toward the finality of arbitral interpretation is the

not the case." Resp. Br. at 5. Yet respondent does not even discuss—let alone attempt to distinguish—the decisions of the Third, Fifth, Seventh and Eighth Circuits which we cited in our petition (at 13-15) even though in each: the contract required just cause for discharge and defined certain conduct as constituting a dischargeable offense; the arbitrator overturned the discharge on the ground that under the contract the offensive conduct could, but need not, constitute cause for discharge; and the appellate court enforced the arbitral award. Respondent's silence with respect to these cases is pregnant with significance.[3]

C. Instead of treating with the cases that are in square conflict with the decision below, respondent instead discusses or cites eight other cases which, according to respondent, prove that the courts of appeals all "agree with the premise underlying the First Circuit's decision" in the instant case. Resp. Br. at 6. But while those cases show that at the most general level all the courts of appeals recognize that they are obligated to apply the *Enterprise Wheel* standard of review, respond-

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continued inconsistency in the response to arbitration awards that find just cause for discipline of an employee but not for discharge").

[3] Respondent's sole comment with respect to the cases on which we relied in our petition to establish the existence of a circuit conflict is that "[*n*]*ot one* of the . . . decisions . . . contains any statement rejecting, or even mildly criticizing, the Sixth and Tenth Circuit decisions [on which the court below relied]; nor do they acknowledge the existence of the conflict suggested by the Union." Resp. Br. at 5. But the test of whether a circuit conflict exists is *not* whether one circuit has chosen to "criticize" another circuit but rather whether two circuits have reached contrary conclusions on a question of law. Respondent does not dispute our showing that the decisions of the four circuits discussed in our petition did in fact, raise the same legal issue presented by the instant case (and by the Sixth and Tenth Circuit cases on which the court below relied), and that the courts have reached diametrically opposite conclusions in these cases.

ents' cases also highlight the divergent understanding of the courts of appeals concerning the meaning of that very general and abstract standard. *See* p. 2 *supra*.[4]

Although respondent pretends otherwise, what the arbitrator did in this case was to conclude, based on extrinsic evidence of the parties' intent (including, most importantly, the parties' past practice), that the collectice bargaining agreement authorizes arbitral review of whether discharge is the appropriate penalty for a particular offense, including an offense listed in the contract as a "cause for discharge." *See* Pet. at 4-6. In holding that this award does not "draw its essence" from the contract, the court below reasoned that an arbitrator's task is solely to " 'construe ambiguous contract language,' " Pet. App. 8a; that an arbitral award cannot stand if it is inconsistent with "the plain meaning of the words that the parties agreed upon," *id.* at 14a; and that it is the court's function to decide, *de novo*, whether contract language has such a "plain meaning." In sum, as the lower court said, "we must examine the award and the judgment below in the light of the contract to see if the contract was unambiguous." *Id.* at 11a.[5] The decisions respondent cites reflect an entirely different understanding of the role of arbitrators and courts, and of the *Enterprise Wheel* standard of review.

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[4] None of the cases respondent cites arose in the same factual context as the instant case and the cases discussed in our petition, and thus none of the decisions can ameliorate the circuit conflict to which we pointed. Indeed, only one of respondent's cases even discusses the enforceability of arbitral awards of the type involved here and in the cases we cited, and the brief discussion in that case of such awards is *obiter dictum*. *See Kane Gas Light & Heating Co. v. Electrical Workers Local 112*, 687 F.2d 673, 680 (3d Cir. 1982) (noting that in the case before the court "no findings of fact were made that would constitute proper cause for discharge" but stating that "an arbitrator's decision should be vacated when the arbitrator finds facts that constitute grounds for discharge under the collective bargaining agreement but . . . refuses to uphold the discharge").

For example, in *Ethyl Corp. v. Steelworkers*, 768 F.2d 180 (7th Cir. 1985), which respondent cites (at 6), the court affirmed an arbitration award granting vacation benefits to employees who were not on the employer's payroll as of December 31st of the year in question, even though the collective bargaining agreement, in terms, extended such benefits only to employees who were on the payroll as of that date; the arbitrator found that the parties had impliedly agreed that this requirement would not apply where the plant was shutdown as of December 31st. Reasoning that "contracts have implied as well as express terms, and the authority of an arbitrator to interpret a collective bargaining contract includes the power to discover such terms," *id.* at 186, the Seventh Circuit enforced the arbitral award, explaining:

> The arbitrator may not modify the contract unless authorized to do so. But despite contrary intimations in [the Sixth Circuit's decision] in *Sears, Roebuck & Co. v. Teamsters Local 243*, 683 F.2d 154, 1565 (6th Cir. 1982), *there is no rule that an arbitrator in order to find an implied condition, must first find the language of the contract to be ambiguous. Although a literal reading of the contract in this case would preclude the implied condition the arbitrator found, he was not obliged to read the contract literally.* [*Id.*; emphasis added] [6]

The Seventh Circuit added: "the reviewing court's function . . . is at an end when it concludes that what the

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[5] As we noted in our petition, this same theory has led the Sixth Circuit to conclude, in a decision roughly contemporaneous with the decision below, that an arbitral award cannot stand if the award "conflicts with express terms of the collective bargaining agreement" or "imposes additional requirements that are not expressly provided in the agreement." *Dobbs Inc. v. Teamsters Local 614*, 813 F.2d 85 (6th Cir. 1987).

[6] Respondent quotes only the first sentence of the passage quoted in text and thus presents *Ethyl Corp.* as standing for the proposition that "the arbitrator may not modify the contract unless authorized to do so." *See* Resp. Br. at 6.

arbitrator did was interpretation of the contract." *Id.* at 187.

Similarly, in *H.K. Porter Co. v. United Saw File & Steel Products Workers*, 333 F.2d 596 (3rd Cir. 1964), which respondent also cites (at 6), the Third Circuit enforced an arbitral award granting pension benefits to employees who had not obtained age 65 as of the time their plant was closed, even though the contract, read literally, afforded pension benefits only to employees who had obtained that age. The arbitrator based his ruling on the past practice under the agreement; the court stated that "these practices formed a source of guidance to which the Arbitrator was authorized to look, in interpreting the eligibility clause of the agreement." *Id.* at 601.[7] *See also* the following cases cited by respondent at pp. 5-7: *Kane Gas Light & Heating Co. v. Electrical Workers Local 112, supra*, 687 F.2d at 678 (enforcing an arbitration award and stating that an award " 'does "draw its essence from the collective bargaining agreement" if the interpretation can in any rational way be derived from the agreement, viewed in the light of its language, its context, and any other indicia of the parties intention' "); *Teamsters Local 657 v. Stanley Structures Inc.*, 735 F.2d 903, 905 (5th Cir. 1984) (enforcing an award

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[7] At the same time, the court in *H.K. Porter* refused to enforce that portion of the arbitral award extending benefits to employees who had less than twenty-five years of service, as the agreement, in terms, required that amount of service to qualify for a pension and there was no evidence of past practice to support the arbitrator's award in this regard. The court stated:

> *Bereft of any practice evidencing a relaxation of the requirement of years of total service* . . . the Arbitrator was unjustified in deviating from the plain mandate of the eligibility clause. [333 F.2d at 602; emphasis added]

Respondent omits the underscored words in quoting from the opinion in *H.K. Porter* and thus presents the case as one faulting an arbitrator for " 'deviating from the plain mandate' of contract." Resp. Br. at 6.

and stating that "an award should be enforced so long as it has a basis that is 'rationally inferable, if not obviously drawn, from the letter or purpose of the collective bargaining agreement' "); and *Trailway Lines, Inc. v. Trailways Joint Council*, 807 F.2d 1416, 1423 (8th Cir. 1986), (overturning an arbitral award in part because "by ignoring the Company's past practice . . . [the arbitrator] ignored an extremely relevant source of . . . law—the law of the shop").

Thus, the very decisions respondents cites make clear that at least the Third, Seventh and Eighth Circuits do not agree with the court below (and those courts with which the court below is allied) that collective bargaining agreements must be read in a dryly literal fashion, and that at least the Third, Fifth and Seventh Circuits have refused to arrogate to themselves the authority to decide whether a collective bargaining agreement is ambiguous. These decisions thus confirm Professor Kaden's observation:

> Justice Douglas' encomium to arbitration in the *Steelworkers* decisions should have been the beginning, not the end, of the development of the theory of the relationship between judges and arbitrators. . . . The *Steelworkers* opinions made an important, even historic, start, but they should have been followed after a time by further efforts to elaborate a theory of national labor policy applicable to collective bargaining agreements. [Kaden, *supra*, 80 Colum. L. Rev. at 276-77]

CONCLUSION

For the foregoing reasons, and those stated in our petition, the Court should issue a writ of certiorari to review the decision below.

Respectfully submitted,

MARK BROOKS
UNITED PAPERWORKERS
INTERNATIONAL UNION
P.O. Box 1475
Nashville, TN 37202

LAURENCE GOLD
(Counsel of Record)
DAVID SILBERMAN
815 Sixteenth Street, N.W.
Washington, D.C. 20006
(202) 637-5390

Of Counsel:
STEPHEN P. SUNENBLICK
P.O. Box 7060, DTS
97 India Street
Portland, ME 04112